# THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

October 20, 1977

Honorable Hugh C. Yantis, Chairman
State Board of Insurance
1110 San Jacinto
Austin, Texas

Open Records Decision No. 180

Re: Whether information furnished the State Board of Insurance by a company in connection with a disciplinary hearing is public under the Open Records Act.

Dear Mr. Yantis:

The State Board of Insurance has received a request pursuant to the Open Records Act, article 6252-17a, V.T.C.S., to produce certain records in its custody. It acquired the records in connection with a disciplinary hearing on possible violations of the Insurance Code by Independent Research Agency for Life Insurance (IRA) and United Services Planning Association (USPA). These two companies engage in some joint activities, such as sponsoring financial planning seminars and preparing training and sales materials. In an order dated October 16, 1975, the Commissioner of Insurance directed that "USPA and IRA will take such actions as may be necessary . . . to make it clear that USPA is not engaged as an agent in the insurance business, that IRA is an agent engaged in the insurance business, and to delineate the role or functions of each entity in any integrated or joint program of insurance and securities solicitations and sales. . . ." USPA and IRA consented to the entry of the order without, however, admitting any wrongdoing.

The requestor has already obtained certain of the records pursuant to an administrative subpoena. We will therefore limit this decision to the records not covered by the subpoena. These consist of training manuals and materials of USPA or IRA. The training materials include lessons to be completed by prospective salesmen, copies of agent contracts with USPA and IRA, and forms used in dealing with insurance companies. Among the training materials are issues of the USPA/IRA Bulletin, a home office publication sent out to salesmen. It publicizes good salesmenship, while also communicating information about home office procedures and the performance of certain insurance companies.

There are also USPA/IRA directives to employees describing the organization of IRA and USPA, noting the investment and insurance programs recommended to clients, and providing information on disclosure laws. Finally, the training materials include copies of newspaper and magazine articles, and correspondence from insurance agents, companies, and clients. Some of the lessons, forms, and bulletins have been copyrighted by IRA/USPA, while the periodical articles have been copyrighted by their publisher.

You suggest that sections 3(a)(1), (3), (4), and (10) of the Open Records Act may except the training materials from disclosure. Section 3(a)(1) excepts from disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision. . . ." We are aware of no Insurance Code provision that might make this information confidential. See Open Records Decision Nos. 158 (1977); 124 (1976).

We do not believe that the training materials contain personal information relating to identifiable individuals which might be protected from disclosure by a common law or constitutional right of privacy. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 679 (Tex. 1976), cert. denied, 97 S. Ct. 1550 (1977). Certain forms which appear to show financial and personal information about clients actually relate to fictitious persons. There are copies of letters to and from clients, but in most cases the names have been changed or removed. Even where the name appears to be that of an actual person, we do not believe the letters contain information pertaining to experiences within the zones of privacy protected by the federal constitution or disclose the sort of embarrassing private facts protected from release by a common law right of privacy. See Open Records Decision Nos. 168, 163 (1977); 142 (1976).

Some of the materials are stamped Private and Confidential -- Not for Public Review, Copying, or Distribution. We assume that IRA/USPA stamped this message on its papers before delivering them to the State Board of Insurance in response to its request. The State Board of Insurance has power to require the production of records and papers in connection with hearings on violation of the Insurance Code. Ins. Code art. 21.07 - 1 § 12; 21.21 § 6. We do not believe that IRA/USPA could condition its production of records on the Board's maintenance of confidentially. Information is not excepted from disclosure solely because the individual furnished it with the expectation that access to it would be restricted. Industrial Foundation of the South v. Texas Industrial Accident Board, 540

S.W.2d at 677. We do not believe that any of the training materials are information deemed confidential by law within the terms of exception 3(a)(1).

Section 3(a)(3) excepts from disclosure

> information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party . . . that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

These materials were produced in connection with an administrative hearing. Although the administrative proceedings have not yet been completed there is a reasonable chance that litigation to which the state will be a party will follow final administrative action. See Ins. Code art. 1.04(f); Attorney General Opinion H-483 (1974). However, even if litigation results, this office has concluded that public disclosure of the requested materials would not adversely affect the interest of the State. See Open Records Decision No. 135 (1976).

You indicate that the materials are "information which, if released, would give advantage to competitors or bidders" and thus excepted from disclosure by section 3(a)(4). Neither the State Board of Insurance nor USPA/IRA has drawn our attention to any facts about the competitive situation of the companies that require the application of this exception. Open Records Decision Nos. 170 (1977); 124 (1976); 95 (1975).

Finally, you suggest that the training materials are excepted by section 3(a)(10) as "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." It is unlikely that this section exempts from disclosure any information not exempt under 3(a)(1). Attorney General Opinion H-258 (1974). We do not believe that secrecy has been maintained with respect to the training materials so that they could qualify as trade secrets. See Luccous v. Kinley Co., 376 S.W.2d 336 (Tex. 1964); Open Records Decision No. 175 (1977). Various portions of the materials have been communicated to clients and prospective employees so that no substantial element of secrecy exists. See Restatement of Torts § 757, Comment b. Nor do we see how the copyrighted materials can be trade secrets, since federal copyright is secured by publication with notice of copyright. 17

U.S.C.A. §§ 10, 13, 212. Cf. Luccous v. Kinley Co., supra (claim of trade secret incompatible with election to surrender protection of secrecy in return for a patent). In our opinion, these materials are not protected from disclosure by section 3(a)(10).

You also ask whether the Board may reproduce the copyrighted materials without the consent of the copyright holder. Any copying of these materials by the Board or requestor must be consistent with the Federal Copyright Law. The courts have developed the "fair use" doctrine as a defense to an infringement action, and the revised copyright law, which goes into effect on January 1, 1978, incorporates this doctrine. [1976] U.S. Code Cong. & Ad. News 5659. We cannot determine the extent to which the fair use doctrine permits copying of the materials in this case, since it depends on the facts and circumstances involved. Annot. 23 ALR 3d 139, 172 (1969). Moreover, it may also require an inquiry into the requestor's plans for use of the material, an inquiry which may not be made under the Open Records Act. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 674. We can, however, indicate some of the factors considered by the courts in determining whether a particular use was an infringement of fair use. These have included the following: (1) the amount and importance of the material taken from the work, (2) the nature of the copyrighted works, (3) the purpose of the use, and (4) the effect of the use on the market for the copyrighted work. See, e.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973). Whether or not the requestor may copy these materials, he is entitled to inspect them under the Open Records Act. See Open Records Decision 109 (1975).

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

jst